

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 32760 (Sub-No. 21)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND  
MISSOURI PACIFIC RAILROAD COMPANY—CONTROL AND MERGER—SOUTHERN  
PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC TRANSPORTATION  
COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, SPCSL CORP.,  
AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

[GENERAL OVERSIGHT]

Decision No. 19

Decided: November 8, 2001

We address, in this decision, the Houston-Memphis-St. Louis corridor trackage rights issues raised in the fifth annual round of this “general oversight” proceeding.<sup>1</sup> As explained below, we clarify that the “entry/exit” and “Texas/Louisiana” restrictions placed on the trackage rights accorded to The Burlington Northern and Santa Fe Railway Company (BNSF) in the corridor—pursuant to the BNSF and CMA Agreements,<sup>2</sup> whose terms we imposed as conditions to our authorization of the UP/SP merger—do not apply to shippers’ traffic moving via BNSF pursuant to the merger’s “build-in/build/out” and “new facilities” conditions that we also imposed. Moreover, they also do not apply to traffic moving to and from the intermediate “2-to-1” points expressly listed in the agreements. In all other respects, the restrictions continue to apply. We direct the carriers to revise their proposed “restated and amended” agreement accordingly.

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<sup>1</sup> Other issues raised in this round of the oversight proceeding will be addressed in a subsequent decision.

<sup>2</sup> The BNSF Agreement refers to the agreement entered into by the UP/SP applicants and BNSF, dated September 25, 1995, as modified by the supplemental agreement dated November 18, 1995, and as further modified by the second supplemental agreement dated June 27, 1996. Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 247 n.15 (1996) (Merger Dec. No. 44). The CMA Agreement refers to the agreement that UP and SP entered into on April 18, 1996, with BNSF and the Chemical Manufacturers Association (CMA). Id. at 243, 254-55.

## BACKGROUND

On August 12, 1996, we authorized the common control and merger of the rail carriers controlled by Union Pacific Corporation (collectively UP) and the rail carriers controlled by Southern Pacific Rail Corporation (collectively SP), subject to various conditions.<sup>3</sup> Among the conditions attached to that authorization, we required UP to abide by the terms of the BNSF Agreement, as supplemented by the CMA Agreement, under which UP provided BNSF approximately 4,000 miles of trackage rights over the merged UP/SP system to preserve, among other things, competitive rail service for “2-to-1” shippers—those shippers that, prior to the merger, were served by UP and SP, but by no other railroad. Merger Dec. No. 44, 1 S.T.B. at 252.

We also expanded upon those agreements by imposing several other broad-based conditions that afforded BNSF trackage rights to serve shippers that, as a result of the merger, would have been deprived of a “build-in/build-out” option, and to serve new facilities (including transload facilities) on both UP and former SP lines over which BNSF received trackage rights under the BNSF Agreement. Merger Dec. No. 44, 1 S.T.B. at 419-20. These conditions were designed to replicate other competitive opportunities that would otherwise have been lost upon SP’s absorption into UP, and to aid BNSF in obtaining enough traffic to compete effectively with the merged UP/SP.<sup>4</sup> Id. at 372-73.

As part of the BNSF Agreement, BNSF was afforded trackage rights in the Houston-Memphis-St. Louis corridor over various UP and SP lines.<sup>5</sup> Section 6(c) of the BNSF

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<sup>3</sup> UP’s acquisition of common control was consummated on September 11, 1996, and the merger was completed on February 1, 1998.

<sup>4</sup> To further the objective of a sufficient BNSF traffic base for BNSF to provide an effective competitive alternative, we also required UP to make available to BNSF for bidding at least 50% of the traffic (by volume) that was under UP and SP contracts at 2-to-1 points on all of the BNSF trackage rights corridors. Merger Dec. No. 44, 1 S.T.B. at 373, 419-20.

<sup>5</sup> These lines are: (1) UP’s line between Houston, TX, and Valley Junction, IL (located just east of St. Louis, MO), via Palestine, TX, Little Rock, Bald Knob, and Hoxie, AR; (2) SP’s former line between Houston and Illmo, MO (located near Rockview, MO, at about the mid-point of BNSF’s own Memphis-St. Louis line), via Cleveland, TX, Pine Bluff, Brinkley, Fair Oaks, and Jonesboro, AR, and Dexter Junction, MO; (3) UP’s line between Bald Knob and Bridge Junction, AR (located just west of Memphis, TN); (4) SP’s former line between Brinkley and Briark, AR (located just west of Memphis, TN); and (5) UP’s line between Pine Bluff and North Little Rock, AR. See Section 6(a) of BNSF Agreement; UP/SP-22 at 326-27; UP/SP-266, (continued...)

Agreement provided that the trackage rights in this corridor would be bridge rights for the movement of overhead traffic only, except where specified, and further provided that the trackage rights would be subject to two restrictions, as follows:

Except as provided by Section 9(l) of this Agreement, BNSF shall not have the right to enter or exit at intermediate points on UP's and SP's lines between Memphis and Valley Junction, IL. Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana except that traffic originating or terminating at points listed on Exhibit A under the caption "Points Referred to in Section 6c" may also be handled over these lines.<sup>[6]</sup>

Section 9(l) of the Agreement provides, in pertinent part,<sup>7</sup> that:

BNSF shall have the right to connect, for movement in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with lines it will purchase or be granted trackage rights over pursuant to this Agreement.

UP and BNSF have jointly submitted for our review and approval here a "restated and amended" version of the BNSF Agreement. See UP/SP-386, BNSF-92 (Joint Submission). The carriers indicate that this updated version incorporates the conditions in the BNSF Agreement that we adopted and imposed in Merger Dec. No. 44, as clarified and supplemented in subsequent Board decisions. It also incorporates certain agreements that UP and BNSF have reached relating to those conditions and other matters. But, in addition to the matters on which UP and BNSF have reached agreement, the restated and amended agreement includes conflicting proposals with respect to certain issues on which the carriers do not agree, including, as pertinent here, the scope of BNSF's Houston-Memphis-St. Louis trackage rights.

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<sup>5</sup>(...continued)  
Exhibit A at 11. See also UP/SP-387, Map #1.

<sup>6</sup> Those points are Camden, AR, Pine Bluff, AR, Fair Oaks, AR, Baldwin, AR, Little Rock, AR, North Little Rock, AR, East Little Rock, AR, Forrest City, AR, Paragould, AR, and Dexter, MO. See UP/SP-22 at 358-59; UP/SP-266, Exhibit A at 11-12; Joint Submission (UP/SP-386, BNSF-92), Exhibit A, at 2.

<sup>7</sup> See UP/SP-22 at 354.

Specifically, BNSF would remove the “entry/exit” and “Texas/Louisiana” restrictions now contained in Section 6(c) by deleting the above-noted language entirely. See Joint Submission, Proposed Restated and Amended BNSF Settlement Agreement, at 26. UP, on the other hand, would retain the entry/exit restriction, but remove the “Except as provided in Section 9(l) of this Agreement” language of Section 6(c) to make clear that this restriction on BNSF’s trackage rights supersedes the general “intersecting points” provision of Section 9(l). UP would also specifically clarify that the entry/exit restriction applies at intermediate points on UP’s and SP’s lines between Bald Knob and Fair Oaks, AR (points at roughly the same latitude as Memphis), and Valley Junction, IL, and it would retain the Texas/Louisiana restriction essentially in its current form. Id. Accordingly, UP’s proposal would have new Section 6(d) restate Section 6(c) in pertinent part as follows:

BNSF shall not have the right to enter or exit at intermediate points north of Bald Knob and Fair Oaks, AR on UP’s and SP’s lines between Memphis and Valley Junction, IL. Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana, except that traffic originating or terminating at points listed on Exhibit A under the caption ‘Points Referred to in Section 6(d)’ may also be handled over these lines.

UP and BNSF each filed comments on the other’s proposals (UP/SP-387, BNSF-93), and further comments were filed by Entergy Services, Inc., and Entergy Arkansas, Inc. (collectively Entergy) (ESI-33, ESI-34); The National Industrial Transportation League (NITL) (NITL-27); the American Chemistry Council (ACC) (formerly CMA) (ACC-1); and the United States Department of Transportation (DOT) (DOT-6, DOT-7). UP and BNSF replied (UP/SP-389, BNSF-94, BNSF-96).<sup>8</sup>

## DISCUSSION AND CONCLUSIONS

**Build-In/Build-Out Lines, New Facilities, and Named 2-to-1 Points.** We have imposed competitive conditions upon our approval of a rail consolidation in order to replicate, insofar as possible, competition that would otherwise have been lost as a result of the transaction. See, e.g., Merger Dec. No. 44, 1 S.T.B. at 419. Here, we imposed as conditions the terms of the BNSF Agreement, as supplemented by the CMA Agreement, so that, among other things, BNSF could offer a competitive alternative for 2-to-1 shippers, and over 2-to-1 corridors. But, as we have observed, we also expanded upon those agreements to impose conditions that would preserve other pre-merger competitive options. There is no basis to conclude, nor did we intend,

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<sup>8</sup> UP also filed a letter (undesignated) on September 24, 2001. All of the pleadings are summarized in the Appendix to this decision. See also UP/SP-385 and BNSF-PR-20.

that the restrictions contained in Section 6(c) of the BNSF Agreement would work to narrow the scope of the remedial conditions that we imposed to prevent those competitive options from being lost.<sup>9</sup>

The “new facilities” condition, for example, was imposed to preserve indirect “siting competition”—the ability of a shipper “to play UP and SP against each other in deciding where to locate new facilities”—and “to enable BNSF to achieve sufficient traffic density on the trackage rights lines.” Merger Dec. No. 61,<sup>10</sup> at 9, 10; see also Merger Dec. No. 44, 1 S.T.B. at 372-73. Application of the restrictions in Section 6(c)—to deny BNSF similar routings to those that would have been available to UP or SP for traffic moving to and from any new facilities on either a UP or former SP line over which BNSF had received trackage rights in the corridor—would undermine those purposes.

Likewise, we imposed a general condition to preserve the pre-merger opportunity of a railroad to “build-in” to a shipper, or a shipper to “build-out” to a railroad.<sup>11</sup> Prior to the merger, any traffic that UP or SP might have obtained from shippers in the corridor via build-in/build-out lines could have moved via any routes then open to UP or SP. Thus, application of the entry/exit and Texas/Louisiana restrictions as to build-in/build-out traffic would prevent BNSF from replicating the competitive role that UP or SP provided in these circumstances and would improperly undercut this condition as well.

Nor, finally, is there any basis to apply the “entry/exit” restriction to deprive shippers at the named intermediate points in Section 6(c) (see note 6) of the full measure of the competitive protections afforded to 2-to-1 points under the BNSF Agreement. BNSF’s trackage rights in the Houston-Memphis-St. Louis corridor largely addressed 2-to-1 shippers in Texas and Louisiana that, prior to the merger, moved traffic over the entire corridor to and from the St. Louis Gateway

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<sup>9</sup> UP has in fact acknowledged that the Texas/Louisiana restriction does not apply to traffic moving via BNSF from new facilities or build-outs along the trackage rights lines in the corridor. See, e.g., UP letter, September 24, 2001 (supra note 8), at 1-2.

<sup>10</sup> Union Pacific Corp.—Control & Merger—Southern Pacific Corp., STB Finance Docket No. 32760, Decision No. 61 (STB served Nov. 20, 1996) (Merger Dec. No. 61).

<sup>11</sup> This condition was based upon a provision in the CMA Agreement under which, for a limited period of time after the merger, a CMA member that showed that the merger had deprived it of a build-in/build-out option from/to a second rail carrier could obtain that access through substituted BNSF service, thus replicating the competitive options that had been available from UP and SP. We expanded upon this approach by preserving pre-merger build-in/build-out options for all shippers, removing the time limit, and clarifying that the test of feasibility would be whether the line was constructed. Merger Dec. No. 44, 1 S.T.B. at 373, 420.

via either UP or SP (St. Louis Gateway traffic).<sup>12</sup> BNSF agreed that it would use the UP and SP lines between Memphis and Valley Junction only for traffic to or from Texas and Louisiana, and that it would not enter or exit the UP and SP Memphis-Valley Junction trackage rights lines at intermediate points between Memphis (i.e., Bald Knob and Fair Oaks, AR) and Valley Junction. Even though this traffic generally moved over the entire corridor, UP insisted on these restrictions to ensure that BNSF would use UP and SP track for the St. Louis Gateway traffic that the trackage rights were primarily designed to address, and that BNSF would use its own lines for other, non-merger related traffic.<sup>13</sup> UP/SP-387, at 14-17, V.S. Rebensdorf, at 3-4.

Neither the character of the St. Louis Gateway traffic nor UP's underlying concerns are relevant, however, to shippers at the named intermediate 2-to-1 points within the corridor. Like shippers with previous build-in/build-out options, shippers at the interior 2-to-1 points prior to the merger could have—and, at these points, likely did—move over any routes open to UP or SP that could connect with BNSF or other rail lines north of Memphis. Thus, we find that the entry/exit restriction of Section 6(c) may not be invoked to prevent BNSF from replicating that competitive option for traffic from these particular points.

**Entergy.** These principles are best illustrated by the circumstances involving Entergy. Entergy owns and operates a coal-fired electric generating plant at White Bluff Station, located just north of Pine Bluff, AR, that is served solely by UP over that carrier's Pine Bluff-Little Rock line. As a result, UP has always delivered to White Bluff the Powder River Basin (PRB) coal that the plant uses. SP, however, also operated a nearby line through Pine Bluff, giving the utility a pre-merger competitive build-out option that we expressly preserved, via substituted BNSF

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<sup>12</sup> Under the initial BNSF Agreement, BNSF would have gained trackage rights over the former SP line only between Houston and Memphis and then used its own line from Memphis to St. Louis to serve the St. Louis Gateway. See UP/SP-387, Map #1. However, addressing concerns by chemical shippers (whose movements comprised much of the St. Louis Gateway traffic) that BNSF would not be able to compete effectively with a merged UP/SP in that way, UP/SP applicants entered into the CMA Agreement, which afforded BNSF access to UP and SP lines along the entire corridor from Houston to the St. Louis Gateway and allowed BNSF to perform “directional running” for its traffic moving over the parallel UP and SP lines comprising the corridor. UP/SP-387, at 14, V.S. Rebensdorf, at 2-3; see also Map #1.

<sup>13</sup> Thus, for example, BNSF must continue to use its own Memphis-St. Louis line—not the UP/SP trackage rights—for its St. Louis Gateway traffic to and from the Southeast that moved via Memphis over other BNSF lines serving southeastern points such as Birmingham, AL, and Pensacola, FL. UP/SP-387, V.S. Rebensdorf, at 3-4.

service, if and when such a line were constructed.<sup>14</sup> Merger Dec. No. 44, 1 S.T.B. at 429, 469; see also ESI-34, at 5-6.

Entergy and BNSF point out, and UP acknowledges, that a pre-merger BNSF-SP routing of PRB coal trains to and from White Bluff could have moved via Jonesboro, AR, and the utility argues that applying the entry/exit restriction for BNSF trackage rights trains at points north of Bald Knob and Fair Oaks (such as Jonesboro) would improperly preclude Entergy from replicating that option and force longer and less efficient trackage rights movements to White Bluff via Memphis. ESI-34, at 8, BNSF-94, at 21 n.19. UP concedes that, absent the entry/exit restriction, BNSF would have “a slightly more efficient route,” but contends that BNSF would be an effective competitive replacement for SP for Entergy’s White Bluff coal traffic even with the restriction, and that there is therefore no basis to override the restriction for Entergy’s traffic. UP/SP-389, at 22.

UP’s argument, however, is inconsistent with the build-out condition itself, which was imposed to allow “BNSF to replicate the competitive options now provided by the independent operations of UP and SP.” Merger Dec. No. 44, 1 S.T.B. at 420. Because Entergy’s pre-merger build-out option via SP would have included a connection with BNSF at Jonesboro, a post-merger BNSF option must necessarily include a connection with the BNSF line at Jonesboro.<sup>15</sup> Otherwise, Entergy would be left with less than what it had previously, thereby defeating the purpose of the build-out condition. There is no basis to conclude from Merger Dec.

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<sup>14</sup> In Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp., STB Finance Docket No. 32760, Decision No. 88 (STB served Mar. 21, 2000) (Merger Dec. No. 88), we clarified that Entergy also had a pre-merger build-out option to link its White Bluff generating plant with a closer point on SP’s line (8.6 miles away) than the point (21 miles away) that we had identified in Merger Dec. No. 44, and we preserved its ability to replicate that option and receive substituted BNSF service should the line be constructed.

<sup>15</sup> Consistent with both the build-out condition and UP’s post-merger implementation of directional running, BNSF should also be permitted to exit the trackage rights lines at Hoxie, AR. Prior to the merger, the SP line through Jonesboro would have handled Entergy’s build-out traffic to and from White Bluff in both directions. Under UP’s directional running, however, the SP line now generally handles southbound traffic only, and northbound traffic is handled on the parallel UP line that runs through Hoxie. BNSF, of course, has trackage rights over both lines; indeed, the trackage rights over the northbound UP line were granted to allow BNSF to “run with the flow” of UP traffic. It is in no one’s interests to force BNSF to run empty, dedicated unit-trains from White Bluff northbound on the SP southbound line. Thus, consistent with directional running, BNSF must be entitled to “enter” the trackage rights lines at Jonesboro and “exit” back to its own line at Hoxie. See UP/SP-387, Map #1.

No. 44, nor did we intend, that the entry/exit restriction could thwart our broad-based build-out condition in this way.<sup>16</sup>

Finally, the fact that BNSF has now been afforded the right to serve White Bluff directly via UP's Pine Bluff-Little Rock line,<sup>17</sup> thereby obviating the need for Entergy to construct a build-out, does not change the principle that the entry/exit restriction does not apply here. We had already conditionally authorized Entergy's construction of the 8.6-mile build-out that we had preserved in Merger Dec. No. 88 (*supra* note 14) before BNSF obtained the additional trackage rights, and have subsequently granted final approval for that construction.<sup>18</sup> Because the additional trackage rights substitute for that construction, they do not alter Entergy's right to receive service without restrictions that would not have been in place for SP-BNSF service before the merger.

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<sup>16</sup> Moreover, as BNSF points out, the additional mileage (if the entry/exit restriction were applied) for routing PRB unit-coal trains on its lines past Jonesboro to Memphis and then onto SP's former line back to White Bluff would, contrary to UP's arguments, likely affect BNSF's competitiveness for Entergy's traffic in various ways, including increased transit and cycle times (plus a likely increased cost to Entergy of equipment and the potential need for (and costs of) additional crews) that, as a result, would diminish BNSF's ability to guarantee needed service levels. BNSF also points out that its cost of service would further increase due to the costs of constructing and/or rehabilitating necessary connections and lines in Memphis to handle this traffic. BNSF-94, at 21 n.19.

<sup>17</sup> BNSF's direct access to Entergy was part of a settlement of Entergy's private lawsuit against UP for events occurring during the UP/SP service crisis in the aftermath of the merger. (We recognize that references to these trackage rights that BNSF obtained as a result of the settlement were submitted as confidential, ESI-34, at 3, but we must be able to refer to and address the evidence in a meaningful way. *See, e.g., CF Indus. v. Koch Pipeline Co., L.P.*, STB Docket No. 41685 (STB served May 9, 2000), at 2 n.3.

<sup>18</sup> *See* Entergy Ark. & Entergy Rail-Construct. & Oper. Exempt.-White Bluff, AR, STB Finance Docket No. 33782 (STB served May 4, 2000, and Sept. 28, 2001).



In sum, UP's application of the entry/exit restriction or the Texas/Louisiana restriction to traffic moving subject to the build-in/build-out conditions (such as Entergy's traffic) and the new facilities conditions, and traffic moving from or to the named intermediate 2-to-1 points within the corridor would undermine the conditions we imposed in Merger Dec. No. 44. See DOT-7, at 5. Accordingly, the restated and amended version of the BNSF Agreement should be amended to make clear that neither of the restrictions applies to traffic moving from or to build-in/build-out lines, new facilities, or the named 2-to-1 points,<sup>19</sup> and we direct UP and BNSF to do so.

**St. Louis Gateway Traffic.** On the other hand, there is no basis to remove the entry/exit and Texas/Louisiana restrictions entirely, as BNSF urges. The restrictions were designed to ensure UP that BNSF would use the trackage rights lines only as intended—to preserve the SP competition for St. Louis Gateway traffic that otherwise would have been lost through the merger—and not for BNSF's other, non-merger related operations.

BNSF's arguments<sup>20</sup> for removing these restrictions on its trackage rights are unconvincing. BNSF argues that the phrase in current Section 6(c) of the BNSF Agreement—"Except as provided in Section 9(l) of this Agreement"—overrides the entry/exit restriction and establishes a right for BNSF to intersect with its own lines north of Bald Knob and Fair Oaks. BNSF-93, at 16 n.12, BNSF-94, at 19 & n.17. But that interpretation is illogical. It would make no sense to have a provision barring BNSF from entering or exiting the trackage rights lines at intermediate, intersecting points north of Memphis, except as provided in another provision allowing BNSF to enter and exit the trackage rights lines at those points. Looking at the phrase in Section 6(c) in the context of the entire agreement, we agree with UP that the reference to Section 9(l) simply confirms BNSF's general right under the agreement to establish connections between its own lines and the trackage rights lines with respect to all of the trackage rights granted in Section 6 except for St. Louis Gateway traffic carried by BNSF over the UP/SP lines between Memphis and Valley Junction.<sup>21</sup> UP/SP-389, at 15-16.

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<sup>19</sup> While UP has acknowledged that the Texas/Louisiana restriction does not apply to traffic moving pursuant to these conditions (supra note 9), this should be clearly reflected in the text of the restated and amended BNSF Agreement.

<sup>20</sup> BNSF's arguments have been joined in, to a greater or lesser extent, by Entergy, NITL, ACC, and DOT.

<sup>21</sup> Alternatively, BNSF argues that the entry/exit restriction was intended to bar its entry or exit to or from the UP/SP trackage rights lines only at intermediate points where it would

(continued...)

Contrary to BNSF’s arguments, BNSF-PR-20, at 115-16, BNSF-93, at 16-17, BNSF-94, at 20-21, we did not reject in Merger Dec. No. 61 the entry/exit and Texas/Louisiana restrictions contained in Section 6(c). That decision addressed UP’s effort to impose a new restriction on the BNSF trackage rights, pursuant to the new facilities condition. We rejected UP’s attempt to further restrict BNSF’s use of the trackage rights, because it would be inconsistent with one of the purposes of the new facilities condition—ensuring that BNSF could gain adequate traffic density to be an effective competitor. See Merger Dec. No. 61, at 11. In doing so, however, we did not disturb the entry/exit and Texas/Louisiana restrictions as they apply to St. Louis Gateway traffic. If “traffic density” concerns were elevated above all others, as BNSF implicitly suggests, they would sweep aside every restriction contained in the BNSF Agreement, including the most fundamental restriction—that the trackage rights acquired by BNSF are overhead rights unless otherwise provided. It was never our intention to nullify each and every restriction that might conceivably interfere with BNSF’s efforts to add to its traffic density. Such a result would be an unwarranted distortion of UP and SP’s settlement with BNSF, the kind of private-sector resolution that we encourage and favor.

Finally, BNSF argues that, while “it is not BNSF’s intent to routinely route” its non-merger-related traffic over the UP/SP trackage rights lines in the corridor, we should nevertheless remove the entry/exit and Texas/Louisiana restrictions so that the carrier can “have the routing flexibility it needs to achieve the network system efficiencies” for it to “effectively replace SP.” BNSF-94, at 22-23. But this argument works to persuade us to retain the restrictions, rather than remove them, because it confirms why UP sought the restrictions in the first place—the concern that BNSF would use the trackage rights lines for movements unrelated to the merger. BNSF accepted these restrictions originally and has advanced no compelling reason why we should now override them and enable BNSF to use UP’s system to benefit BNSF’s broader operations.

Because the entry/exit and Texas/Louisiana restrictions continue to fulfill their purpose of ensuring that BNSF’s trackage rights only prevent the loss of competition in the corridor for St. Louis Gateway traffic, and go no further, we see no basis to disturb them. We therefore direct UP and BNSF, in addition to the other revisions ordered in this decision, to adopt the language proposed by UP in Section 6(d) of the restated and amended agreement that clarifies that the entry/exit restriction supersedes the “intersecting points” authorization of Section 9(l)—as

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<sup>21</sup>(...continued)  
connect with the lines of other railroads—not BNSF lines—or at intermediate points where the trackage rights lines connect with the lines of other railroads over which BNSF had acquired the right to operate. BNSF-94, at 19-20. But this explanation likewise makes little sense because, as UP has explained, BNSF does not have a right to use its trackage rights over UP or SP lines to connect with the lines of other railroads except where those lines are specifically identified in the agreement. UP/SP-389, at 16-17; Joint Submission, Proposed Restated and Amended BNSF Settlement Agreement, Section 6(d), at 28.

restated in Section 9(m)—as to points on the UP and SP trackage rights lines north of Bald Knob and Fair Oaks.<sup>22</sup>

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF and UP must amend the restated and amended version of the BNSF Agreement to make clear that neither the entry/exit restriction nor the Texas/Louisiana restriction applies to traffic moving from or to build-in/build-out lines, new facilities, or the 2-to-1 points identified in Section 6(c) of the BNSF Agreement.

2. Pursuant to our general build-out condition, BNSF unit coal trains moving to and from Entergy's White Bluff facility pursuant to trackage rights that UP afforded to BNSF in settlement of a private lawsuit, which substitute for the need to construct a build-out line, must be allowed to enter and exit the trackage rights lines at Jonesboro and Hoxie, AR, respectively.

3. In all other respects, BNSF and UP must include, in the restated and amended version of the BNSF Agreement, the language proposed by UP with respect to the entry/exit restriction and the Texas/Louisiana restriction.

4. This decision is effective December 8, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams  
Secretary

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<sup>22</sup> After we complete our review of all of the issues raised in the fifth annual round of the UP/SP general oversight proceeding, we will establish the due date for the submission of another "restated and amended" version of the BNSF Agreement, as clarified and as directed to be amended in this decision.

## APPENDIX: ARGUMENTS OF THE PARTIES

**BNSF's Arguments.** (1) BNSF contends that the entry/exit and Texas/Louisiana restrictions stem from a version of the BNSF Agreement that pre-dated our expansion of BNSF's rights, an expansion (BNSF further contends) that we believed was required to ensure full replacement competition and long-term traffic density. BNSF adds that, to the extent UP (and perhaps even BNSF) originally intended BNSF's use of the Houston-Memphis-St. Louis corridor trackage rights lines to be restricted, that intent has clearly been overridden by our decisions. BNSF explains: that, in Merger Dec. No. 44, we authorized BNSF to serve "new facilities" on UP-owned lines; that UP thereafter attempted to impose a restriction on BNSF's right to serve "new facilities" on two particular UP lines (the Houston-Valley Junction and Bald Knob-Fair Oaks lines); and that, in Merger Dec. No. 61, we rejected UP's attempt to impose this restriction because (we said) this restriction would be inconsistent with one of the principal purposes of the "new facilities" condition, i.e., ensuring that BNSF could achieve sufficient traffic density not only in the short term but also over the long term.

(2) BNSF contends that UP's current proposal to restrict BNSF's ability to enter and exit the Houston-Memphis-St. Louis corridor trackage rights lines and to place geographic limitations on the traffic BNSF can carry over those lines would have the same effect as the "new facilities" proposal that we rejected in Merger Dec. No. 61. BNSF explains: that restricting BNSF's ability to connect with the trackage rights lines at points north of Bald Knob and Fair Oaks would adversely affect BNSF's ability to compete in the Houston-Memphis-St. Louis corridor; that, by way of example, unit coal trains from the PRB that BNSF could move, in competition with UP, to electric utilities and generating stations located in the corridor (such as Entergy's White Bluff Station, located north of Pine Bluff, AR, on UP's Little Rock-Pine Bluff line) would most efficiently move over BNSF's lines from the PRB to the point of connection with the SP trackage rights line at Jonesboro (for inbound trains) and from White Bluff to the point of connection with the UP trackage rights line at Hoxie (for outbound trains); and that, although BNSF may have other routes over which it could move such trains into and out of the Houston-Memphis-St. Louis corridor, those routes are more circuitous and would therefore not enable BNSF to compete as effectively against UP. BNSF adds that Merger Dec. No. 88, wherein we granted Entergy the ability to replicate its pre-merger build-out option at White Bluff (by building out to an SP line and receiving service from BNSF via the build-out line), would be seriously undercut if UP could prevent BNSF from connecting with the SP line at Jonesboro.

(3) BNSF contends that the argument that the BNSF Agreement did not give BNSF the right to connect with its own lines north of Memphis because BNSF has its own network of lines in northeastern Arkansas and southeast Missouri was rejected in Merger Dec. No. 61 as a basis

for limiting BNSF's trackage rights.<sup>23</sup> BNSF further contends that the argument that BNSF's trackage rights were granted on the UP/SP lines north of Bald Knob and Fair Oaks solely for purposes of operating convenience in order to allow BNSF to avoid problems that might occur from running "against the flow" in the Houston-Memphis-St. Louis corridor was similarly rejected in Merger Dec. No. 61 as a basis for limiting BNSF's trackage rights.<sup>24</sup>

(4) As respects the entry/exit restriction, BNSF contends that UP has not simply asked that Section 6(c) of the BNSF Agreement be retained, but, rather, has asked that a key phrase of that language ("Except as provided in Section 9l of this Agreement") be deleted. BNSF explains: that this phrase provides, in essence, that the restriction on BNSF's right to connect with the UP and SP lines at issue is subject to BNSF's right to connect with its own lines under the provision now proposed to be codified as Section 9(m); that, therefore, the "plain meaning" of the language of the 1996 version of the BNSF Agreement (language, BNSF claims, that was drafted largely, if not entirely, by UP) gives BNSF the right to connect with its own lines pursuant to the provision now proposed to be codified as Section 9(m); and that, although BNSF is not resting its argument that the existing restrictions should be discontinued solely on the presence of the "Except as provided in Section 9l of this Agreement" phrase in the entry/exit restriction, the fact remains that the parties clearly intended that BNSF's right to connect with its own lines — pursuant to the provision now proposed to be codified as Section 9(m) — would apply notwithstanding the entry/exit restriction. And, BNSF adds, because there were at least 2 shortlines (the Missouri & Northern Arkansas Railroad at Diaz, AR, and the Jackson & Southern Railroad at Delta, MO) operating at the time of the UP/SP merger to which the entry/exit restriction would have been applicable under BNSF's interpretation, this interpretation does not read the entry/exit restriction out of the BNSF Agreement.

(5) BNSF contends that, although UP claims that the entry/exit restriction was crafted in accordance with the terms of the CMA Agreement, the fact of the matter is that the CMA Agreement itself contains no restriction on BNSF's right to enter or exit the Memphis-

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<sup>23</sup> BNSF cites Merger Dec. No. 61, slip op. at 11, in support of its statement that we rejected, in Merger Dec. No. 61, the argument that, because BNSF has its own network of lines in northeastern Arkansas and southeast Missouri, the 1996 version of the BNSF Agreement did not give BNSF the right to connect with its own lines north of Memphis. Merger Dec. No. 61, however, does not address any such argument.

<sup>24</sup> BNSF cites Merger Dec. No. 61, slip op. at 11, in support of its statement that we rejected, in Merger Dec. No. 61, the argument that, because BNSF's trackage rights on the UP/SP lines north of Bald Knob and Fair Oaks were granted for purposes of operating convenience, BNSF should not have the right to serve "new facilities" on the UP line north of Bald Knob. This is indeed an accurate assessment of this aspect of that decision. See Merger Dec. No. 61, slip op. at 11 (the 4th and 5th paragraphs).

Valley Junction trackage rights lines. BNSF further contends that, even assuming that *the parties* to the CMA Agreement were concerned primarily (or even exclusively) about BNSF's ability to compete effectively for St. Louis traffic when they granted BNSF trackage rights north of Bald Knob and Fair Oaks, *the Board* had broader concerns in mind when it enhanced BNSF's right to provide service in the Houston-Memphis-St. Louis corridor. The Board was also concerned, BNSF adds, about BNSF's ability to acquire and maintain sufficient traffic density in that corridor.

(6) BNSF contends that, whereas the expansion (in Merger Dec. No. 44) of the new facilities and general build-out conditions substantially enhanced BNSF's rights to serve shippers in the Houston-Memphis-St. Louis corridor, the adoption of UP's position respecting the entry/exit restriction would significantly affect BNSF's ability to provide competitive service in that corridor by increasing BNSF's cost of service and shippers' cost of equipment. BNSF further contends that the restriction on entry and exit would prevent BNSF from providing a competitive replacement service for SP's pre-merger service and would also eliminate specific pre-merger joint-line routings that BNSF could have offered by interchanging with SP at Jonesboro and with UP at Hoxie. With particular respect to the Entergy situation, BNSF contends that the entry/exit restriction could adversely affect BNSF's competitiveness to provide service to Entergy's White Bluff facility. BNSF explains that the additional mileage (approximately 166 miles, by BNSF's calculations) that the entry/exit restriction would add to BNSF's route between the PRB and White Bluff would, at least to some degree, make BNSF less competitive, not only because of the additional mileage itself but also because Entergy's cost of equipment could increase, BNSF could potentially be required to utilize additional crews, and BNSF's transit and cycle times and its ability to guarantee competitive levels of service could be adversely affected. And, BNSF adds, it would also be forced to incur significant expenses to construct and/or rehabilitate the necessary connections and lines in Memphis, thereby further increasing its cost of service.

(7) BNSF contends that the Texas/Louisiana restriction, if read literally, conflicts with the "new facilities" condition that we imposed in Merger Dec. No. 44. BNSF explains that, if its use of the Memphis-Valley Junction trackage rights lines is to be limited to traffic that moves from, to, or via Texas or Louisiana, it will not be able to serve new facilities located in Arkansas or Missouri (unless, of course, the new facilities happen to be located at the 10 Arkansas and Missouri points accorded special treatment in the Texas/Louisiana restriction). BNSF further contends that, even if the Texas/Louisiana restriction is read to allow BNSF to handle "merger-related" traffic that neither moves from/to the 10 specified Arkansas and Missouri points nor moves from/to/via Texas or Louisiana, the Texas/Louisiana restriction would still conflict with the "new facilities" condition because (BNSF apparently contends) traffic moving from/to new facilities in Arkansas or Missouri cannot be regarded as "merger-related."

(8) BNSF contends that, although it does not intend to routinely route its traffic unrelated to the merger to and from the Southeast over the Memphis-Valley Junction trackage rights lines,

we should order that the Texas/Louisiana restriction be deleted from the BNSF Agreement in order to allow BNSF to have the routing flexibility it needs to implement and achieve network system efficiencies and to maintain sufficient traffic densities to effectively replace SP. BNSF further contends that, at a minimum, we should hold that BNSF can use the trackage rights lines north of Bald Knob and Fair Oaks not only to provide competitive service to all shippers located in the corridor to which BNSF obtained access (such as Entergy at White Bluff) but also to all merger-related traffic moving both within and beyond the corridor itself.

(9) BNSF argues that, UP's claims to the contrary notwithstanding, BNSF is not seeking new rights or conditions but, rather, is merely seeking authoritative clarifications of its existing rights under the BNSF Agreement.

**Entergy's Arguments.** (1) Entergy contends: that we should confirm that BNSF has the right, under the present version of the BNSF Agreement, to enter and exit UP trackage at Jonesboro and Hoxie; and that we should reject UP's proposal to delete the provisions of Section 6(c) that give BNSF that right.

(2) Entergy indicates that, although White Bluff has heretofore been rail-served exclusively by UP, Entergy — acting in reliance upon Merger Dec. No. 88 and in further reliance upon certain commitments UP made in settling a dispute with Entergy — has negotiated with BNSF the terms of a rail transportation contract covering deliveries by BNSF of PRB coal to White Bluff. Entergy further indicates, however, that BNSF has advised that UP's proposed modification of the entry/exit restriction would seriously degrade the efficiency of BNSF's proposed service to White Bluff. Entergy explains: that BNSF's most efficient routing for unit coal trains to White Bluff would be to move via its own lines to Jonesboro (the point at which BNSF would enter the trackage rights lines), then move south with the directional flow of UP traffic over the former SP line through Fair Oaks to Pine Bluff, and then move north over UP's Little Rock-Pine Bluff line to the White Bluff turnout; that BNSF's most efficient return routing for empty trains would be to move back onto the Little Rock-Pine Bluff line, then move north to Little Rock, and then move north with the directional flow of UP traffic over the former UP line through Bald Knob to Hoxie (the point at which BNSF would exit the trackage rights lines); that UP, however, has insisted that BNSF may not enter or exit the trackage rights lines at either Jonesboro or Hoxie, but, rather, must enter and exit the trackage rights lines at Memphis; and that BNSF has advised that the Memphis routing insisted upon by UP would be significantly more circuitous and expensive than the routing preferred by BNSF.

(3) Entergy contends that, even though Section 6(c) of the 1996 version of the BNSF Agreement provides that "BNSF shall not have the right to enter or exit [the Memphis-Valley Junction trackage rights lines] at intermediate points" between Memphis and Valley Junction, UP's position (that BNSF cannot enter or exit the trackage rights lines at Jonesboro and Hoxie) has no basis in, and indeed runs directly counter to the express language of, the 1996 version of the BNSF Agreement. Section 6(c), Entergy explains, provides that the

restriction that bars BNSF's entry to and exit from the trackage rights lines at intermediate points between Memphis and Valley Junction applies "[e]xcept as provided in" Section 9(l). And Section 9(l), Entergy further explains, provides that "BNSF shall have the right to connect, for movement in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with lines it will purchase or be granted trackage rights over pursuant to this Agreement." The unambiguous language of the 1996 version of the BNSF Agreement, Entergy therefore concludes, authorizes BNSF to enter and exit the trackage rights lines at any and all points (including "intermediate points" such as Jonesboro and Hoxie) where they intersect with BNSF's own "present lines (including existing trackage rights)." And UP, Entergy argues, has offered no evidence that the parties to the CMA Agreement (UP/SP, BNSF, and CMA) intended Section 6(c) to deny BNSF the right to enter or exit *its own lines* at intermediate points on the Memphis-Valley Junction trackage rights lines, a right (Entergy notes) that is the norm everywhere else on the trackage rights provided for in the BNSF Agreement.

(4) Entergy contends that UP's proposed change to Section 6(c) — i.e., the proposed removal of the "Except as provided in Section 9l of this Agreement" cross-reference — is plainly designed to ratify, after the fact, the anticompetitive position UP is taking, and thereby to enhance UP's inherent advantage, as track owner and operator, in the nascent competition for Entergy's coal traffic. Entergy further contends that UP's proposed elimination of BNSF's entry/exit rights at Jonesboro and Hoxie would undermine BNSF's ability to compete for Entergy's coal traffic at White Bluff, and would thereby: (i) run counter to the principle that post-merger UP vs. BNSF competition should be as complete and as effective as pre-merger UP vs. SP competition could have been; and (ii) undermine UP's commitments to Entergy. Entergy explains: that, in order for BNSF to be able to compete with the same level of efficiency as a through BNSF-SP route could have competed but for the merger, BNSF must be allowed to replicate, insofar as possible, the pre-merger BNSF-SP routing's route and operational conditions; that, but for UP's post-merger imposition of directional flows, this would simply have required routing BNSF trains to White Bluff in both directions over the Jonesboro connection; but that, given UP's directional flow arrangements, BNSF must be allowed to substitute the paired northbound route and connection, i.e., UP's line to the connection at Hoxie. Entergy also explains that, by preventing BNSF from routing its trains returning from White Bluff in that manner, UP's proposed amendment of Section 6(c) would give itself a cost advantage against BNSF that it would not have enjoyed against a BNSF-SP through movement. Entergy further explains that, whereas BNSF's preferred routing would run 157 miles from Jonesboro to the White Bluff turnout and 144 miles from the White Bluff turnout to Hoxie (for a total of 301 miles), the Memphis routing insisted upon by UP would run 214 miles from Jonesboro to the turnout and 253 miles from the turnout to Hoxie (for a total of 467 miles). The circuitry involved in the Memphis routing, Entergy notes, would be considerable (the Memphis routing, Entergy advises, is 55% longer than BNSF's preferred routing). And, Entergy adds, the Memphis routing — by increasing the distance BNSF's trains must travel to reach White Bluff — could significantly lengthen BNSF's cycle times on Entergy's traffic, and thereby increase



both BNSF's cost of service and Entergy's cost of equipment in comparison to those experienced with the competing UP service to White Bluff.

(5) Entergy contends, in essence, that its interpretation of Sections 6(c) and 9(l) of the 1996 version of the BNSF Agreement does not render meaningless the portion of Section 6(c) that provides that "BNSF shall not have the right to enter or exit at intermediate points on UP's and SP's lines between Memphis and Valley Junction, IL." This entry/exit restriction, Entergy explains, precludes BNSF from connecting with the lines of *other carriers* (including shortlines) between Memphis and Valley Junction, even if BNSF subsequently acquires ownership of or operating rights over the lines of such other carriers. Examples of such prohibited entry/exit points, Entergy adds, would be UP's connection with the Missouri & Northern Arkansas Railroad at Diaz, AR, and its connection with the Jackson & Southern Railroad at Delta, MO.

**NITL's Arguments.** NITL supports BNSF's positions respecting the entry/exit and Texas/Louisiana restrictions. NITL contends, in general: that the technical language of the BNSF Agreement must be read in the light of our decisions, which (NITL argues) converted that agreement from a private settlement to an integral part of the mechanism by which we implemented our statutory responsibility to protect the public interest; and that, because the rail industry can no longer afford to tolerate inefficiencies, we should read the technical language of the BNSF Agreement in such a way as to avoid, where possible, the imposition of unnecessary operational restrictions on BNSF's trackage rights. NITL also contends: that UP's position that BNSF trains in the Houston-Memphis-St. Louis corridor should not be able to enter or exit the trackage rights lines at intermediate points north of Bald Knob and Fair Oaks is an operational restriction that we should not permit; that, under the restriction advocated by UP, BNSF's southbound traffic would have to continue past those points to Memphis, and then come back to the trackage rights lines at Bald Knob or Fair Oaks (or Brinkley), depending upon the destination; that, however, prior to the merger BNSF could have interchanged traffic moving on its own Memphis-Kansas City line either with UP at Hoxie or with SP at Jonesboro; and that, therefore, the restriction advocated by UP is inconsistent with the intent of the trackage rights condition that we imposed (which intent, NITL argues, was to replace the competitive rail service that had existed prior to the merger). NITL further contends that the technical language of the entry/exit restriction itself (i.e., the "Except as provided in Section 9l of this Agreement" language) gives BNSF the right to connect with its own lines north of Bald Knob and Fair Oaks.

**ACC's Arguments.** ACC contends that, to enable BNSF to rectify the loss of competition on the Memphis-Valley Junction and Bald Knob-Fair Oaks trackage rights lines and to enable BNSF to achieve sufficient traffic densities on these lines, we should clarify that BNSF's use of these lines is not restricted to overhead traffic originating or terminating in Texas or Louisiana. ACC further contends that, in Merger Dec. No. 61, we have already rejected the argument that these trackage rights are limited to overhead traffic. ACC explains that, when we clarified that the "new facilities" condition applies to these lines, we clarified (in essence) that BNSF has access to traffic originating and terminating on these lines, and is not limited to using

the lines for the movement of overhead traffic originating and terminating in Texas and Louisiana.

**UP's Arguments, In General.** (1) UP contends: that the original version of the BNSF Agreement contemplated that BNSF would acquire only Houston-Memphis (not Houston-Memphis-St. Louis) trackage rights, that such rights would allow BNSF to operate only on *SP's* Houston-Memphis line (and not on *UP's* parallel Houston-Memphis line), and that BNSF would compete in the Houston-Memphis-St. Louis corridor by combining its Houston-Memphis *SP* line trackage rights with BNSF's own Memphis-St. Louis line; that, however, CMA and several other parties argued, during the course of the UP/SP merger proceeding, that BNSF would not be able to compete effectively against UP/SP in the Houston-Memphis-St. Louis corridor (i.e., that BNSF would not be able to replicate the competition provided by *SP* in that corridor) unless it obtained trackage rights on UP/SP all the way to the St. Louis Gateway (and, such parties further argued, UP's plans to institute "directional operations" required that BNSF receive trackage rights over both UP *and* SP); that, therefore, in order to gain CMA's support for the merger, it was agreed (in the CMA Agreement that was entered into by CMA, BNSF, and UP/SP) that BNSF would acquire Memphis-St. Louis trackage rights on both the UP line and the SP line, and would also acquire Houston-Memphis trackage rights on the UP line; that, however, it was also agreed (by BNSF, CMA, and UP/SP) that BNSF would use its Memphis-St. Louis trackage rights only to serve St. Louis Gateway traffic, and would continue to use its own Memphis-St. Louis line to carry traffic that already used that line; and that, in order to ensure that BNSF would use its Memphis-St. Louis trackage rights only to handle St. Louis Gateway traffic, and would continue to use its own Memphis-St. Louis line to carry traffic that already used that line, the parties agreed that the St. Louis Gateway trackage rights would be subject to 2 restrictions (the entry/exit restriction, which provides that BNSF's trains cannot enter or leave the trackage rights lines at intermediate points north of Bald Knob and Fair Oaks;<sup>25</sup> and the Texas/Louisiana restriction, which provides that BNSF can carry, over the UP/SP lines between Memphis and Valley Junction, only traffic that moves from, to, or via Texas or Louisiana, except that BNSF can also carry, over such lines, traffic originating or terminating at 10 specified points in Arkansas and Missouri).

(2) UP contends that, in Merger Dec. No. 44, when we imposed the BNSF Agreement and the CMA Agreement, we imposed these agreements with the challenged restrictions intact. UP further contends that these restrictions made sense in 1996 and that they continue to make sense today. UP explains: that CMA's competitive concern was limited to St. Louis Gateway

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<sup>25</sup> For reasons that are not entirely clear, UP sometimes refers to the entry/exit restriction as if the crucial point on the SP line were not Fair Oaks but, rather, Brinkley (which is located several miles south of Fair Oaks). For present purposes, however, this discrepancy appears to have no obvious consequences, because there appear to be no "intermediate points" between Fair Oaks and Brinkley.

traffic; that the new, restricted trackage rights between Memphis and St. Louis solved this concern without giving BNSF additional rights not necessary to replicate pre-merger UP vs. SP competition; that the entry/exit restriction reflected the fact that the only justification for the Memphis-St. Louis trackage rights was to give BNSF a more direct route to St. Louis for traffic affected by the UP/SP merger; that the Texas/Louisiana restriction reflected the fact that it was in Texas and Louisiana that BNSF gained access to industries as a result of the UP/SP merger; and that the restrictions also ensured that BNSF would use its own network of tracks rather than relying unnecessarily on UP/SP's tracks.

(3) UP concedes, in essence, that the removal of the entry/exit restriction would indeed allow BNSF to be a more effective competitor; the removal of this restriction, UP explains, would modestly shorten BNSF's routes for certain traffic and would save it some operating expenses. UP contends, however: that neither BNSF nor any other party argued in 1996 or has argued in the years since that BNSF needs to use the routes that would be made available by the removal of the entry/exit restriction; that, in fact, BNSF wants to be a more effective competitor for traffic that has nothing to do with the St. Louis Gateway (traffic, UP adds, for which BNSF can compete using its own lines); and that neither the UP/SP merger itself, nor the restrictions to which BNSF agreed in the 1996 version of the BNSF Agreement, created a competitive failure that must now be corrected (mileage differences between competing routes, UP notes, are universal in the railroad industry, and cannot be regarded as competitive failures). UP further contends that the challenged restrictions do not prevent BNSF from replacing the competition formerly provided by SP. And, UP adds, Entergy itself has argued (though not in the pleadings filed in the fifth annual round of the UP/SP general oversight proceeding) that the White Bluff build-out that we preserved in Merger Dec. No. 88 will result in "competitive rail transportation service" at "competitive rates."

(4) UP further concedes, in essence, that the removal of the Texas/Louisiana restriction might also allow BNSF to be a more effective competitor for traffic now barred from UP/SP's Memphis-Valley Junction lines by that restriction. UP contends, however: that BNSF has offered no explanation for striking this restriction; that, in fact, there is no plausible theory under which removing this restriction would remedy a competitive failure caused by the merger; and that the traffic subject to this restriction moves exactly as it did before the merger (i.e., it moves on BNSF's own Memphis-St. Louis line, which runs along the Mississippi River and which, UP advises, is used by BNSF to handle traffic to and from Birmingham, AL, and points throughout the Southeast). UP further contends: that it may be that BNSF would prefer to abandon parts of its Mississippi River line in favor of using UP's tracks; that, although this would confer a financial windfall on BNSF, this would work to the detriment of the few shippers located on the line segments that BNSF would abandon; and that this would also work to the detriment of UP, because (UP explains), although it invested millions of dollars after the merger to expand capacity near Dexter, MO, to handle post-merger traffic, its own tracks are still congested in places. BNSF, UP maintains, should be required to do what it agreed to do in the 1996 version

of the BNSF Agreement (i.e., to use UP/SP lines only for merger-related traffic and to use its own lines for other traffic).

(5) The Texas/Louisiana restriction, read literally, provides that BNSF can use the Memphis-Valley Junction trackage rights lines to handle: (i) traffic moving “over” the Memphis-Valley Junction trackage rights lines from, to, or via points in Texas or Louisiana; and (ii) traffic moving “over” the Memphis-Valley Junction trackage rights lines from or to 10 specified points in Arkansas and Missouri. The word “over” is important, because — according to UP — it is by virtue of the word “over” that “the geographic restriction [UP refers to the Texas/Louisiana restriction as the geographic restriction] expressly applies only to overhead traffic. It does not apply to traffic from new facilities, transloads, or build-outs along the trackage rights lines.” See the undesignated UP letter filed September 24, 2001, at 1-2 (the carryover paragraph). BNSF’s claim that the Texas/Louisiana restriction conflicts with the “new facilities” condition, UP therefore argues, is simply wrong (UP is arguing, in essence, that, because traffic moving from/to a new facility located in Arkansas or Missouri would not be “overhead” traffic, such traffic would not be subject to the Texas/Louisiana restriction).

(6) The Texas/Louisiana restriction, read literally, provides that BNSF can use the Memphis-Valley Junction trackage rights lines to handle: (i) traffic moving from, to, or via points in Texas or Louisiana; and (ii) traffic moving from or to 10 specified points in Arkansas and Missouri. The tenor of UP’s comments suggests (although this is not entirely clear) that UP may be arguing that the Texas/Louisiana restriction allows BNSF to handle a third category of traffic as well: (iii) traffic moving from or to all points in Arkansas and Missouri, provided only that such traffic is merger-related. See, e.g., UP/SP-389 at 22 n.19 (in this footnote, which appears in the part of the UP/SP-389 pleading that discusses Entergy’s interests, UP argues that the Texas/Louisiana restriction does not preclude BNSF’s use of the Memphis-Valley Junction trackage rights lines for coal trains moving to/from White Bluff): “Neither BNSF nor its supporters claim that the geographic restriction [UP, as previously noted, refers to the Texas/Louisiana restriction as the geographic restriction] prevents BNSF from serving as a competitive replacement for SP [as respects Entergy’s White Bluff facility], which is not surprising, because it [the Texas/Louisiana restriction] only affects traffic that would have moved on BNSF’s own line along the Mississippi River between Memphis and St. Louis prior to the merger.”

(7) UP disputes the proposition that Merger Dec. No. 44 gave BNSF unrestricted use of every trackage rights line. UP argues: that BNSF has cited no language in Merger Dec. No. 44 that would support this proposition; that, to the contrary, when we imposed the BNSF and CMA Agreements in Merger Dec. No. 44, we did not strike the now-challenged restrictions, even though (UP notes) we specified the respects in which we wanted to modify those agreements; and that, under these circumstances, our silence respecting these restrictions should be construed as an endorsement, not an implied repeal.

(8) UP disputes the proposition that Merger Dec. No. 61 rejected all limits on BNSF's trackage rights. UP explains that, although that decision says that BNSF can access "new facilities" on UP's Houston-Valley Junction and Bald Knob-Fair Oaks lines, that decision says nothing about removing either the entry/exit restriction on entry to and exit from the St. Louis Gateway trackage rights or the Texas/Louisiana restriction on the traffic that can be handled over the UP/SP lines between Memphis and Valley Junction.

(9) UP disputes the proposition that the entry/exit restriction, as it appears in the 1996 version of the BNSF Agreement, is effectively nullified by its opening phrase, which provides, in essence, that the entry/exit restriction applies "[e]xcept as provided" in Section 9(l), the "intersecting points" authorization. UP contends: that the entry/exit restriction must be read in the context of the entire BNSF Agreement; that, because a literal reading of the entry/exit restriction would render that provision meaningless, a literal reading cannot be appropriate; and that, therefore, the reference to Section 9(l) in the entry/exit restriction should be read to confirm BNSF's right to establish connections between its own lines and the trackage rights lines with respect to all of the trackage rights granted in Section 6 *except* for the trackage rights over the UP/SP lines between Memphis and Valley Junction. UP also disputes the notion that the entry/exit restriction, as it appears in the 1996 version of the BNSF Agreement, should be read to allow BNSF to connect with *its own lines* between Memphis and Valley Junction but not with the lines of *other railroads* between those points; the flaw in this reading, UP argues, is that it would merely prevent BNSF from doing what it has no right to do in the first place, because (UP continues) the BNSF Agreement gives BNSF no right to connect with the lines of other railroads unless such lines are specifically identified. UP similarly disputes the somewhat related notion that the entry/exit restriction, as it appears in the 1996 version of the BNSF Agreement, should be read to preclude BNSF from connecting with the lines of other railroads between Memphis and Valley Junction even if it later acquires ownership of or operating rights over those lines; the flaw in this reading, UP argues, is that BNSF has, under the BNSF Agreement, no right to connect with newly acquired routes even in the absence of the entry/exit restriction's restrictive language, because (UP explains) Section 9(l) allows BNSF to connect only with its "present" lines. See UP/SP-22 at 354.<sup>26</sup>

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<sup>26</sup> UP, which concedes that the language of the entry/exit restriction (as it appears in the 1996 version of the BNSF Agreement) could be improved, has suggested (as previously noted) that it be improved by striking the reference to Section 9(l). UP adds that, if BNSF or others are concerned that eliminating the reference to Section 9(l) would have some additional significance, UP would agree to replace the "Except as provided in Section 9l" language with "Notwithstanding the provision in Section 9(l)" or some other similar language that would clearly indicate that BNSF retains the right to connect between its present lines and the trackage rights granted in Section 6 at all locations except points north of Bald Knob and Fair Oaks.

(10) UP contends: that, because BNSF's proposals would expand the conditions on the UP/SP merger 5 years after UP and SP consummated that merger, we lack the power to grant BNSF's proposals; that our power now is limited to the modification or replacement of conditions that have failed to preserve competition; and that, because the conditions previously imposed on the UP/SP merger have been entirely effective in preserving the UP vs. SP competition that existed prior to the merger, the rule against retroactive regulation would be violated by any attempt to impose, in 2001, new burdens or conditions on the UP/SP merger. UP also contends that BNSF's proposals contravene our policy favoring private settlement agreements; a merged railroad, UP explains, must be able to rely on its settlement agreement partners to honor their agreements in the form imposed by the Board, and should not be forced to fight a rear-guard action throughout the oversight period against attempts by its settlement partners to obtain additional competitive concessions. UP further contends that BNSF's proposals violate BNSF's promises in the BNSF Agreement, in which it agreed "not to seek any conditions in the control case, not to support any requests for conditions filed by others, and not to assist others in pursuing their requests," UP/SP-22 at 338.

**UP's Arguments, As Respects Entergy.** (1) UP concedes, in essence, that the removal of the entry/exit restriction would give BNSF "a slightly more efficient route" to/from Entergy's White Bluff facility (via connections with the trackage rights lines at Jonesboro and Hoxie), and that, therefore, the removal of the entry/exit restriction would make BNSF a slightly more effective competitor for Entergy's White Bluff coal traffic. UP argues, however, that, because BNSF is — as respects Entergy's White Bluff coal traffic — an effective competitive replacement for SP even with the entry/exit restriction left intact, this restriction does not have to be eliminated to preserve competition for Entergy's traffic.<sup>27</sup>

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<sup>27</sup> UP's comments respecting Entergy appear to be premised, at least in part, on the view that, even if there were no entry/exit restriction, the Texas/Louisiana restriction would preclude BNSF's use of the Memphis-Valley Junction trackage rights lines for coal trains moving to/from White Bluff. See, e.g., UP/SP-389 at 21-27 (UP, which refers to the entry/exit and Texas/Louisiana restrictions as "the St. Louis Gateway restrictions," argues that, even if "the St. Louis Gateway restrictions" are left intact, BNSF, utilizing a routing via Memphis, will be able to provide competitive service at White Bluff). As previously noted, however, UP has explicitly represented that the Texas/Louisiana restriction "does not apply to traffic from . . . build-outs along the trackage rights lines," and UP has also explicitly represented that the Texas/Louisiana restriction "only affects traffic that would have moved [whereas Entergy's White Bluff traffic almost certainly would not have moved] on BNSF's own line along the Mississippi River between Memphis and St. Louis prior to the merger." We will therefore assume, for present purposes, that UP has conceded that the Texas/Louisiana restriction does not preclude BNSF's use of the Memphis-Valley Junction trackage rights lines for coal trains moving to/from White Bluff.

(2) UP contends that, even with the entry/exit restriction in place, there is very little circuitry in the post-merger BNSF single-line route as compared to a pre-merger BNSF-SP joint-line route, and that, therefore, the Entergy situation: is like a prior situation in which we declined to impose a condition to correct an alleged circuitous routing problem;<sup>28</sup> and is not like a prior situation in which we did impose a condition to correct a circuitous routing problem.<sup>29</sup> UP explains: that the post-merger BNSF single-line route for loaded trains from the PRB to the White Bluff turnout, with the entry/exit restriction in place (via BNSF's Memphis-Kansas City line, with a connection to the trackage rights lines at Memphis), is 1,447 miles, whereas a pre-merger BNSF-SP joint-line route for loaded trains from the PRB to the White Bluff turnout (via a BNSF-SP connection at Jonesboro) would have been 1,406 miles; that, therefore, the post-merger BNSF single-line route from the PRB to White Bluff, with the entry/exit restriction in place, is merely 41 miles, or 2.9%, longer than the pre-merger BNSF-SP joint-line route; that the post-merger BNSF single-line round-trip route between the PRB and the White Bluff turnout, with the entry/exit restriction in place (the return route for empty trains would run via the trackage rights lines from White Bluff to Little Rock to Bald Knob to Fair Oaks and on to a point just west of Bridge Junction, and then via BNSF's Memphis-Kansas City line), is 2,911 miles, whereas the pre-merger BNSF-SP joint-line round-trip route between the PRB and the White Bluff turnout (via a BNSF-SP connection at Jonesboro) would have been 2,812 miles; and that, therefore, the post-merger BNSF single-line round-trip route between the PRB and White Bluff, with the entry/exit restriction in place, is merely 99 miles, or 3.5%, longer than the pre-merger BNSF-SP joint-line round-trip route. These differences, UP argues, have no competitive significance.<sup>30</sup>

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<sup>28</sup> See Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 13 (STB served Dec. 21, 1998) (General Oversight Dec. No. 13), slip op. at 14-17, 42-51 (in denying the relief sought by the Arkansas, Louisiana and Mississippi Railroad Company, we noted, among other things, that certain joint-line routings “do not appear to be unduly circuitous” vis-à-vis the corresponding single-line routings, slip op. at 15 n.44).

<sup>29</sup> See Merger Dec. No. 44, 1 S.T.B. at 307-08, 471 (in granting the relief sought by Texas Utilities Electric Company, we noted that, post-merger, its “only real competitive options will be the 1,510-mile UP single-line routing and the substantially more expensive 1,749-mile BNSF single-line routing,” 1 S.T.B. at 308, and we concluded that relief was called for because the 1,749-mile BNSF single-line routing would be “excessively circuitous,” 1 S.T.B. at 471).

<sup>30</sup> UP contends that Entergy's calculations exaggerate the circuitry of the post-merger  
(continued...)

(3) UP contends that, even with the entry/exit restriction in place, the post-merger BNSF single-line routing to/from White Bluff will be more efficient, and therefore more competitive, than the pre-merger BNSF-SP joint-line routing would have been. UP explains: that, for one thing, because SP might not have accepted the “short haul” that would have been its lot with a BNSF-SP routing via Jonesboro, the pre-merger BNSF-SP joint-line routing may be an entirely theoretical construct; that, for another thing, even if a joint-line routing could have been implemented, it is doubtful that the pre-merger BNSF-SP joint-line rate would have been as favorable to Entergy as the post-merger BNSF single-line rate; that, in addition, whereas a pre-merger BNSF-SP joint-line routing would have required operation via SP’s single-track line between Jonesboro and White Bluff, the post-merger BNSF single-line routing will benefit from the directional operations that UP has established between Houston and Memphis; and that, furthermore, the post-merger BNSF will be able to offer single-line service without negotiating interchange arrangements or revenue demands with a second carrier.

(4) UP contends that the reality of the situation is that BNSF has already demonstrated that it can compete effectively for Entergy’s White Bluff traffic. UP explains: that BNSF and Entergy have already negotiated the terms of a rail transportation contract covering BNSF deliveries of PRB coal to White Bluff; that neither BNSF nor Entergy has presented any evidence that the benefits of the current contract or the benefits of future competition will be lost if the entry/exit restriction remains in place; that BNSF has not claimed that it entered into the contract without being aware of the entry/exit restriction, nor has BNSF alleged that it will seek to void the contract if the entry/exit restriction remains in place; and that Entergy has not claimed that it would not have entered into the contract if it were aware of the entry/exit restriction, or that it will seek to void the contract if that restriction remains in place, or that it will not in the future seek to enter into contracts with BNSF.

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<sup>30</sup>(...continued)

BNSF single-line route in 2 respects. (i) UP contends that Entergy’s calculations ignore the mileage from the PRB to BNSF’s crossing of the trackage rights lines and thus exaggerate a small overall difference in route length. An accurate comparison, UP argues, must begin with the traffic’s point of origin in the PRB, because (UP notes) BNSF competes not on the basis of its route between Jonesboro and White Bluff but rather on the basis of its route between the PRB and White Bluff. (ii) UP contends that Entergy’s calculations wrongly compare BNSF’s theoretical route without the entry/exit restriction to BNSF’s route with the restriction in place. That comparison, UP argues, is irrelevant because it does not relate to the impact of the UP/SP merger. The correct comparison, UP maintains, is between a pre-merger BNSF-SP joint-line route and a post-merger BNSF single-line route with the entry/exit restriction in place. The flaw in Entergy’s calculations, UP adds, is that the pre-merger BNSF-SP joint-line route could not have taken advantage of UP’s line between White Bluff and a connection with BNSF at Hoxie, which (UP points out) is shorter than the combination of SP’s White Bluff-Jonesboro line and BNSF’s Jonesboro-Hoxie line.



(5) UP contends that its position with respect to the entry/exit restriction does not undermine commitments UP made in settling a dispute with Entergy. UP explains: that UP stands by its commitments, which involved BNSF's use of the Little Rock-Pine Bluff line; that the entry/exit restriction has nothing to do with BNSF's ability to use the Little Rock-Pine Bluff line; that UP never promised Entergy that BNSF would be able to use the Hoxie and Jonesboro connections in providing service to Entergy; and that UP has thus done nothing to interfere with the benefits that Entergy bargained for (i.e., the commitments that UP made in settling its dispute with Entergy).<sup>31</sup>

**DOT's Arguments.** DOT contends that, in resolving the disputes concerning the entry/exit and Texas/Louisiana restrictions, we should adhere to the central purposes of the conditions we imposed on the UP/SP merger (which purposes, DOT adds, were to allow BNSF to replicate the competition provided by SP, and to ensure that BNSF would have access to a sufficient traffic base). DOT also contends, with reference to the entry/exit restriction, that the preservation of pre-merger competition calls for a routing that will allow BNSF to provide service at least as efficiently as the pre-merger SP (which, DOT notes, would have routed Entergy's White Bluff traffic via Jonesboro). DOT further contends, with reference to the entry/exit restriction's "Except as provided in Section 91 of this Agreement" language, that, regardless of the proper interpretation of this language as a matter of contract law, we should remember that, in this proceeding, private agreements must give way to overriding public interest considerations.

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<sup>31</sup> We do not think that UP, by asserting (and asking us to adopt) its views with respect to the entry/exit restriction, has violated the obligation of good faith implicit in its contract with Entergy.